FEDERATION REPORTS.

In Re AN ADVOCATE AND SOLICITOR.

[Orig. Civ. Juris. (Thomson, J.) December 7, 1949]
[Ipoh — Originating Motion No. 15 of 1949]

Advocates and Solicitors Ordinance Ss. 26, 27, 29 and 31 — Whether failure of an Advocate and Solicitor to refund money paid to him as agreed fee and claimed by a client amounts to improper professional conduct.

This was an application under section 31 of the Advocates and Solicitors Ordinance, 1947, for an order that a Solicitor should be called upon to show cause why an order should not be made against him under section 26 of the Ordinance. Arising out of a complaint by a Chinese lady, the local Bar Committee had appointed a Disciplinary Committee, which after investigation found that the Chinese lady had paid the Solicitor $200/- on account of agreed fee, that he had done little or no work in the matter and in particular had taken no steps towards initiating the proceedings which he had been retained to take and that he had steadfastly refused to take any such steps or to refund the money which had been paid to him.

Held, that the facts found by the Disciplinary Committee do not make out the offence of grossly improper professional conduct or any other offence under section 26 of the Advocates and Solicitors Ordinance, as they only amount to a finding that there has been a breach of contract on the part of the Solicitor.

Cases referred to :—

(1) *Re a Solicitor, ex parte Law Society* (1912) 1 K.B. 302 at p. 312.

(2) *In the Matter of a Solicitor* 11 T.L.R 169.

ORIGINATING MOTION.

Chin Swee Onn for the Disciplinary Committee.

The facts sufficiently appear from the judgment.

Cur. Adv. Vult.

Thomson, J. : — This is an application under Section 31 of the Advocates & Solicitors Ordinance, 1947, for an order that a solicitor (to whom I shall refer as A.B.) should be called upon to show cause why an order should not be made against him under section 26 of the Ordinance. I understand that it is the first application of the sort that has come before the Court since the present provisions relating to disciplinary proceedings against solicitors were first enacted in 1940, and accordingly I feel called upon to deal with the issues involved at somewhat greater length than would otherwise be necessary. Before proceeding to do so there is one preliminary observation to be made. It would be a matter of the utmost difficulty in dealing with the matters that arise in this case to avoid the use of words which are much used in connection with the law relating to Criminal Procedure. I wish to make it clear that when I use such words I use them in their ordinary literary sense and not as bearing any sort of technical connotation.

The law in its present form relating to disciplinary proceedings against solicitors is contained in the Advocates & Solicitors Ordinance (No. 4 of 1947) the relevant provisions of which replace in substantially similar form the corresponding provisions of the Advocates & Solicitors Enactment of the Federated Malay States (F.M.S. Enactment No. 1 of 1940) which in its turn replaced the different and simpler provisions of F.M.S. Enactment No. 22 of 1914. By Section 26, a solicitor may be struck off the roll or otherwise dealt with by the Court on due cause being shown by proof that he has been guilty of any one of a number of categories of acts set out in the section. The procedure for invoking the exercise of this jurisdiction by the Court is set out in the succeeding sections of the Ordinance. By Section 27, any complaint as to the conduct of a solicitor in his professional capacity is to be made, in the first instance, to the appropriate local bar committee who are required to examine it, and, if they consider a full investigation necessary, apply in writing to the Chief Justice to appoint a disciplinary committee to hear and investigate it. By Section 29, after hearing and investigating the complaint the disciplinary committee is required to record its findings in relation to the facts of the case and its opinion as to the conduct of the solicitor and as to whether or not the facts of the case constitute due cause for disciplinary action under Section 26. If the disciplinary committee consider that there is due cause for disciplinary action, they are required by Section 29(3) to make an application to the Court in accordance with the provisions of Section 31. Such an application may be made to any Judge sitting in open Court and should be for an order calling upon the solicitor concerned to show cause why an order should not be made upon him. If an order to show cause is made the matter is to come on for hearing and final disposal before a Court of three Judges of whom the Chief Justice must be one.

The procedure laid down by the Ordinance has been followed in connection with the present complaint, the substance of which I shall deal with presently.

On 14th July, 1949, the complainant made her complaint in writing to the local Bar Committee and on 18th August, 1949, made a statutory declaration in support of it. The local Bar Committee applied to the Chief Justice for the appointment of a Disciplinary Committee to investigate the complaint, and on 30th August, 1949, such a committee was appointed. On

26th September, 1949, the Committee met to investigate the complaint and heard evidence from the complainant, the solicitor and the solicitor's clerk. On 25th October, 1949, the Disciplinary Committee made a report setting out certain findings of facts and concluding that the solicitor had been guilty of grossly improper conduct in the discharge of his duty and that the facts of the case constituted due cause for disciplinary action under the Ordinance. On 11th November, 1949, the Disciplinary Committee filed an Originating Motion, *ex parte*, calling upon the solicitor to show cause why an order should not be made against him under Section 26 which was supported by an affidavit by the Chairman of the Disciplinary Committee to which were exhibited copies of the Committee's report and of minutes of the proceedings before the Committee. That motion came on for hearing on 14th November, 1949, and it is with its disposal that I am here concerned.

At this stage it becomes necessary to pause and consider the respective functions of the Disciplinary Committee and of the Judge before whom comes the application for an order to show cause.

As regards the functions of the Disciplinary Committee, the matter is reasonably plain. Before they are appointed there must be in existence a complaint relating to the conduct of the solicitor concerned and they are appointed to "hear and investigate" that complaint. The use of the word "hear" makes it clear that they are to act in a judicial sort of way, and it is to my mind equally clear from the wording of the section that their investigation must be confined to the complaint which they are appointed to investigate. Having heard and investigated the complaint, they are required to record findings as to the facts of the case and their opinion as to the conduct of the solicitor concerned, and as to whether or not the facts of the case constitute due cause for disciplinary action under Section 26 of the Ordinance. There is here a distinction which, to my mind, it is very important to observe. As regards what has in fact happened the Committee are required to record findings but as to whether or not what has happened makes out an offence under section 26, which is a question of law, they are only required to record their opinion. These findings of fact and that opinion as to the conduct of the solicitor and as to whether the facts found make out an offence under Section 26 form the substance of the application that is made to a Judge under Section 31.

There is a complete lack of guidance as to how the matter is to be dealt with by the Judge before whom it comes except what is to be found within the four walls of the Ordinance itself. On reflection, and bearing in mind what I have said as to the functions of the Committee in relation to question of fact and questions of law respectively, I have come to the conclusion that what he must do is accept the findings of fact of the Disciplinary Committee and exercise a discretion to make or refuse to make an order to show cause according to his being or not being satisfied that these findings of fact constitute in law one or other of the offences set out in Section 26. If the discretion to be exercised be any less than that, I fail to see why the matter should be dealt with by a Judge "sitting in open Court", a requirement which the Legislature has emphasised by adding to Section 31(2) in 1947 the words "sitting in open Court" which did not appear in the 1940 Enactment. If all that were required were that the matter should be examined with a view to ascertaining that all the necessary procedural steps had been properly taken, that would surely be as well done by a Judge in Chambers or by a Registrar. On the other hand, were discretion to be exercised in any greater measure than that which I have set out, I fail to see why the Legislature should have prescribed the procedure of an *ex parte* application to one Judge for an order *nisi* returnable before three Judges from whose decision there is no appeal save to His Majesty in Council rather than the procedure of an application to the Court in the ordinary way for an absolute order from the decision on which there would be an appeal to the Court of Appeal.

Having arrived at these results, I proceed in the light of them to a consideration of the present case. The complaint which gave rise to the proceedings was made by a Chinese woman, C.D., and was embodied, in the first place, in a letter dated 14th July, 1949, which she addressed to the Secretary of the local Bar Committee, and in the second place, and in somewhat greater detail, in a statutory declaration dated 18th August, 1949. That was the complaint which the Disciplinary Committee had to "hear and investigate". In effect it made two allegations against the solicitor A.B. The first of these was that C.D. had retained A.B. to take certain proceedings on her behalf in the Supreme Court, that a fee of $300 was agreed for this work, that she paid A.B. $200 on account of this fee, that although he had been retained and the $200 on account paid in November, 1947, A.B. had taken no steps in the matter and had, in spite of several requests, refused to refund the money paid to him. The second

allegation was that she had paid A.B. another sum of $150 for taking certain earlier criminal proceedings in the same matter but that when she demanded the refund of the $200 which was the subject matter of her first allegation, A.B. presented her with a bill which showed that she owed him $300 in respect of the criminal proceedings for which he had already been paid, and that as a result instead of his owing her $200 she owed him $162. She went on to say (in her statutory declaration) — "I say A.B. has sent me the said Bill with a view to avoid me in any claim for the refund of my $200/-."

The Disciplinary Committee thus had before it two allegations against A.B. One was that he had taken a sum of $200 on account of an agreed fee of $300 to do certain work and that he had neither done any of the work nor refunded the money when requested to do so. The other was that in order to avoid the payment of this sum he had rendered to C.D. a bill that was false in a material particular "with a view to avoid" her. What I have to do is to ascertain the findings of fact of the Disciplinary Committee with regard to each of these allegations and to say, accepting these findings of fact, whether they amount in law to facts which would make out an offence under Section 26.

I propose to deal first with the second allegation. That in effect is an allegation that A.B. knowingly rendered a bill which was false in a material particular with the intention of defrauding C.D. by preventing her from obtaining from him money that was lawfully due to her. On that allegation I fail to see that the Disciplinary Committee have arrived at any findings of fact. It is true they have found as a fact that A.B. was paid his fee in the criminal proceedings, and it is true that they have rejected his "averment" that he had a right to refuse to refund the sum of $200 which was paid to him on account of the subsequent civil proceedings. Nowhere, however, have they found as a fact that the bill which he rendered was to his knowledge false in a material particular or that it was rendered with the intention of defrauding (or as she puts it "avoiding") C.D. On that, I am forced to the conclusion either that the Disciplinary Committee did not apply its mind to this allegation or that, having so applied its mind, it came to no conclusion of fact upon it. In either event, I have no finding of fact before me sufficient to make the allegation out, and that being so, so far as that particular allegation is concerned, I do not think I am entitled to make an order calling A.B. to show cause.

As regards the first allegation, the Disciplinary Committee came to very clear findings of fact which amounted to this: that C.D. had paid A.B. $200 on account of his agreed fee, that he had done little or no work in the matter and in particular had taken no steps towards initiating the proceedings which he had been retained to take, and that he had steadfastly refused to take any such steps or to refund the money which had been paid to him. I will not turn aside to speculate as to why C.D. should have taken the present proceedings instead of suing A.B. for the return of her money. What I have to decide is whether the findings of fact stated by the Disciplinary Committee amount in law to any one of the offences set out in Section 26 of the Ordinance, and in particular, whether they amount to "grossly improper conduct in the discharge of his professional duty", for I do not think, and it has not been alleged, that they make out any one of the other offences mentioned in that section.

I do not find it necessary for the purposes of this case to draw a distinction between professional conduct which has been "grossly improper" and which has been "improper", and as regards what is improper professional conduct, I accept it as being "something .... which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency". (See *Re A Solicitor, Ex parte, Law Society*[1]). In my search for assistance in the present case, I have examined a great number of cases where the English Courts have had before them the question of what amounts to professional misconduct. I do not propose to enumerate these but they will be found on pages 232 to 235 of *Cordery's* 'Law relating to Solicitors' (4th Edition), and pages 297 to 300 of Volume XXXI of *Halsbury's* 'Laws of England' (*Hailsham's* Edition). I have also examined a number of Indian cases and have been concerned personally in a number of Colonial cases. I have been unable to find any reported case which can be properly described as on all fours with the present one, though *Cordery* (at p. 234) refers to an unreported case where it was held that non-attendance by a solicitor in Court after receiving his fee did not amount to professional misconduct. In all the cases I have examined where what was involved was the solicitor's relations with his client and where the Courts have held that professional misconduct has existed, there has been present some element of fraud, dishonesty or deceit. I can find no case where the simple failure to do work for which payment has been made or where neglect or even a refusal to pay money where

there has been no question of fraud or misappropriation has been held to amount to professional misconduct. In this connection, I would refer to the case of *In the Matter of a Solicitor*[2]. That was a case where a solicitor had collected a sum of money on behalf of an ignorant and partially illiterate client, had retained the greater part of it without her consent and notwithstanding her repeated applications for payment, and had only paid over what was admittedly due after he was aware that the complainant had made application to a Magistrate for assistance. On these facts the Law Society had found that the solicitor had been guilty of professional misconduct, and on their application the matter came before the Court. Wills, J., said that he saw no evidence of any misrepresentation or deceit on the part of the solicitor. When it was submitted by counsel that but for the application of the client to the Magistrate the money would never have been handed over and that, although the Committee had not said so, that was implied in their findings, His Lordship replied: "The Committee if they do not find a fact expressly cannot expect us to go beyond their finding". He went on to hold that professional misconduct had not been made out.

As I have already said, it is not open to me at this stage to go behind the findings of fact of the Disciplinary Committee; I have to accept them. On this particular allegation, the findings of fact amount to no more than this: that A.B. received the money, that he did little or no work for it and that he refused, when called upon, to refund it. There is no finding that he did these things with the intention of misappropriating the money or defrauding the client or with any other dishonest intention. It may well be that it was open to the Committee on the evidence before them to find that there was such an intention. They have not done so, and I am bound to assume that they had good reasons for not doing so.

In the circumstances, I propose to say that the facts found by the Committee do not make out the offence of grossly improper professional conduct or any other offence under Section 26. What these findings amount to is that there has been a breach of contract on the part of A.B. The penalty imposed by the Courts for breach of contract is damages and costs and I can find no authority for saying that where the party in breach of a contract is a solicitor he should be subject to punishment for improper conduct unless it is clearly found that the breach has been attended by some circumstance of dishonesty.

Apart from any question of authority, I am not prepared to say that there is anything disgraceful or dishonourable in a solicitor refusing to comply with a request to pay over money to a client unless it is shewn that that refusal is actuated by dishonest motives. It seems to me that if I were to hold otherwise it would be unsafe for a solicitor to attempt to defend himself against any claim made against him by a client, however confident he was of the justice of his case.

The application is dismissed.

Application dismissed.

LIM SAY HUN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Spenser-Wilkinson, J.)
March 20, 1950]

[K.L. — Criminal Appeal No. 78 of 1949]

Opium and Chandu Proclamation, s. 3 — Possession of chandu — Meaning of "occupier" — Burden of proof.

In this case the appellant was convicted of possession of chandu in a house at Batu Lane, Kuala Lumpur. The appellant was found in a hall which was the only means of access to various rooms in the house occupied by different sub-tenants. One of the questions raised on appeal was whether the learned President who tried the case was right in finding that the appellant was the occupier of the hall and therefore that the presumption under s. 3(2) of the Opium and Chandu Proclamation applied against him.

Held, (1) that on the facts the appellant was not in exclusive occupation of the hall and therefore he could not be held to be the occupier of the hall; (2) that there was sufficient evidence **aliunde** to show that he was in possession of the chandu and therefore the conviction of the appellant must be upheld.

Obiter: The case of **Rex v. Carr-Briant (3)** which decided that the burden placed upon an accused person where some matter is presumed against him "unless the contrary is proved" may be discharged by evidence satisfying the Court of the probability of that which the accused is called upon to establish, is applicable in cases under the Opium and Chandu Proclamation.

Cases referred to:—

(1) *Ong Eng Soo and two others v. Public Prosecutor* (1949) M.L.J. 231.

(2) *Official Receiver and Liquidator v. Grigg and another* 7 F.M.S.L.R. 48.

(3) *Rex v. Carr-Briant* 29 Cr. App. R. 76.

(4) *Rex v. Garth* 33 Cr. App. R. 100.

CRIMINAL APPEAL from Sessions Court.

E. D. Shearn for the appellant.

C. M. Sheridan for the respondent.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.